**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO. 305 OF 2000**

NICHOLAS @ NECKLESS @ SUBHASH SUNIL PLADA .. APPELLANT

Versus

THE STATE OF MAHARASHTRA .. RESPONDENT

Ms. Daksha M. Shah for appellant

Mr. P.S. Hingorani, APP

CORAM:-SMT. RANJANA DESAI &

D. B. BHOSALE, JJ.

DATED:-24TH AUGUST, 2005

JUDGMENT:-(Per Smt. Ranjana Desai, J.)

. The appellant (for convenience "A-2") along with one Robert Benjamin D'souza, A-1 was tried in the Sessions Court at Bombay in Sessions Case No. 544 of 1997 for offence punishable under Section 302 read with Section 34 of the Indian Penal Code ("I.P.C." for short). By his judgment and order dated 28/2/2000 the learned Judge acquitted A-1 by giving him benefit of doubt. He, however, convicted A-2 for the offence punishable under Section 302 of IPC and sentenced him to suffer R.I.

for life and also to pay a fine of Rs.1000/-, in default to suffer R.I. for one month. Being aggrieved by the said judgment and order A-2 has preferred the instant appeal.

2. The prosecution story may be summed up as under:

. At the relevant time Father Austine Cerejo (the deceased) was director of St. Joseph Cardinal Technical School. Mr. Cajaten D'souza was the Principal and Mr. David Samual Swami was Vice Principal of the said Technical School which is situated at Khashaba Jadhav Marg, Dadar (E), Mumbai 400 014.

. At about 8-30 a.m. on 6th of January, 1997, while complainant David Samual Swamy, PW 4 was in Motor Mechnic Class-room, Mr. Sallis Fernandes came and informed him that he wanted to see the director, Father Austine but Father Austine was not in his office. Nobody was responding to the intercom. They came out of the said class-room. Mr. Balkrishna and A-1 informed him that Father Austine had not even come to take his breakfast. The complainant asked them to go from the back entrance to the Father's room . Mr. Balkrishna, Sallis and A-1 went from the said back enterance

but returned and told him that the said entrance was closed.

. The complainant was having one duplicate key of that room. He went and brought it and handed it over to Mr. Sallis. They went upstairs and opened the door of Father Austine's room. They saw Father Austine lying in a pool of blood. He asked Mr. Sallis to close the door. He went down from the office. He telephoned Principal Mr. D'souza and called him immediately. After Principal D'souza came there they went up and saw the condition of Father Austine. Thereafter the complainant went to Bhoiwada Police Station. The police accompanied him to the school. The police summoned PW 1 Dr. Jain, who examined Father Austine and declared him dead. PSI H. D. Jamdar recorded the statement of the complainant which is at Exhibit P-14. Crime came to be registered at C.R. No. 5/97.

. On the basis of the complaint lodged by PW 4 David Samual Swami investigation was started. On 9/1/97 A-1 was arrested and on 14/1/97 A-2 was arrested. After completion of the investigation they were charged as aforesaid.

. In support of its case, the prosecution examained as many as 16 witnesses. The prosecution

examined PW 4 Mr. Swamy the complainant, PW 7 Mrs. Eleone Neel Rodricks, sister of the deceased, and PW 8 Brune Cecil Cerejo, brother of the deceased. PW 15 Dr. Ashok Gangaram Shinde was examined to prove the postmortem notes. PW 16 Dr. Nutan deposed about the injuries sustained by A-2. The details of investigation were given by PW 13 PSI Harun Dastagir Jamdar and PI Jalander Balu Kurne.

. The accused denied the case. They claimed to be innocent. They did not examine any defence witness. After perusing the evidence and record the trial court acquitted A-1 and convicted A-2 as aforesaid and hence this appeal.

3. We have heard Miss Shah, learned counsel appearing for the appellant-A-2 and Mr. Hingorani, the learned APP for the State. With the assistance of the learned counsel, we have gone through the record of the case.

4. Miss Shah, learned counsel appearing for A-2 strenuously contended that the trial court has erred in convicting A-2, when on the same set of evidence it has acquitted A-1 by giving him benefit of doubt. The learned counsel urged that the prosecution has not examined any eye-witness. She pointed out that the prosecution case rests on

circumstantial evidence. She submitted that several links in the chain of circumstances have been snapped and, therefore, the trial court could not have convicted A-2 on such descrepant circumstantial evidence. She submitted that this is not a case where it can be said that the chain of circumstances is so complete as to point directly to the guilt of the accused. The learned counsel urged that extra judicial confessions alleged to have been made by A-2 are not corroborated by the other evidence on record. There are several discrepancies in the evidence of witnesses examined by the prosecution. She therefore, urged that this court should set aside the order of conviction and acquit A-2.

5. The learned APP on the other hand submitted that the prosecution has successfully established the guilt of A-2. He submitted that Dr. Nutan PW 16 has categorically stated that when she examined A-2 he stated that the injuries found on his person were received by him while murdering Father Austine. The learned APP further pointed out that the chain and the transistor of the deceased were recovered from the house of A-2. This is a clinching circumstance which proves the guilt of A-2. He submitted that this court should confirm the impugned judgment and order. We will examine

these submissions in the light of the evidence on record.

6. PW 11 Dattaram Babaji Kadam was working in Joseph Technical School as Watchman. According to him his duty hours were 11 p.m. to 7 a.m. He has stated in his evidence that on 5/1/97 he joined his duty at 10-45 p.m. The light in the Father's room was glowing till 1-30 a.m. At 1-30 a.m. it was switched off. According to him as the other watchman did not come for duty he continued to do morning duty also. At about 7 a.m. when he went upstairs A-1 told him that the Father has not come for his tea. Then he and Balkrishna informed PW 4 Mr. Swamy about it. Mr. Swamy came and opened the door with duplicate keys. Dead body of the Father was found lying in the room. From the evidence of this witness, it is clear that in the night between 5/1/97 and 6/1/97 the light in Father Austine's room was on till 1-30 a.m.

7. PW 2 Vasant Savaleram Waghmare is working in St. Joseph Cardinal Technical School as a sweeper. He has stated that on 5/1/96 at 8-15 p.m. he was not at his house which is situated on the ground floor of the said school. His wife and A-2 were talking. He came from outside. A-2 wished him Happy New Year. His sister Anusaya was also

present. In the meantime A-1 came down. A-1 told A-2 that he was waiting for him. He said to him in Hindi "Yaar Mai Tumhara Rasta Dekh Raha Tha" (Friend I was waiting for you). Thereafter they went to A-1's room. Within five minutes they returned to him and told him "Abhi Upper Ja Raha Hai, Kisi Ko Bolneka Nahi, Father Ko Marne Ke Liye Ja Raha Hai" (Now we are going upstairs. Do not tell anybody. We are going to kill Father). A-1 went upstairs from the main gate and A-2 went upstairs from the rear gate. He opened the shutter. After 10/15 minutes A-1 returned. He went to his room, changed his clothes and went out. This happened at about 8-15 p.m. In his cross-examination this witness has said that he had consumed pavsher liquor and had gone to his house at 8-15 p.m. He has admitted that everyday he consumes liquor before his meals. He has stated that the Father had harassed many poor persons. He had removed Suresh, Daniyal, Boby Danial, Brown Danial, Haridas and others from service. In the cross-examination a very vital omission has been brought on record. In his statement before the police he has not said that A-2 told them that "Father Ko Marne Ke Liye Ja Rahe Hain."(We are going to kill father). It appears that his eye sight is impaired because he has stated that at the relevant time he was able to see by his one eye

only. He has admitted that he was suspected for the murder of the Father and was arrested by the police. He has, however, denied the suggestion that he has falsely implicated the accused to save himself.

8. We find it difficult to place reliance on this witness. Firstly he has admitted that he was drunk and that he could see with one eye only. Therefore, it is possible that this witness was not in a position to comprehend what was happening and had not seen properly as to who went upstairs to the Father's room. Besides in his police statement he has not said that A-2 told him that they were going to kill the Father. His statement is also not recorded immediately by the police. His statement came to be recorded two days after the incident. He was himself a suspect and was arrested by the police. If indeed A-1 had told him that they were going up to kill the Father then it is surprising how he did not try to prevent such a ghastly incident by telling others or the police about it. We are, therefore, not inclined to place any reliance on this witness.

9. The prosecution has also examined Smt. Anusaya Pandurang Jadhav PW 5 who is the sister of PW 2 Vasant Waghmare. According to her on the day of

the incident she was in her brother Vasant Waghmare's house. She has admitted that she does not know any of the accused as she was not residing there. She has stated that A-2 came to her brother's house. He was standing at the corner of the building and talking with her sister-in-law. A-1 came there and he took A-2 with him. He did not say anything. A-2 said to A-1 that "Father Che Raste Lavanar". He showed A-1 something by lifting his shirt which she could not see. They climbed the staircase. According to her she did not know when they came down. In the cross-examination she has stated that when both the accused were talking their backs were turned towards her. There was no light where both the accused persons were standing. As it was dark and as they were not facing her she could not tell as to who said what and to whom. According to her as those persons were not facing her and due to darkness she could not identify them. The trial court has rightly not placed reliance on the evidence of this witness. Statement of this witness came to be recorded eight days after the incident. She has admitted that she did not know the accused. She has admitted that there was darkness. Though in the examination-in-chief she has said that A-2 said to A-1 that they would kill the Father in the cross-examination she has admitted that she cannot

say who said what and to whom. The evidence of this witness does not help the prosecution.

10. PW 9 is Smt. Kusum Vasant Waghmare, wife of PW 2 Vasant Waghmare. She has stated that on 5/1/97 at about 7-45 p.m. they had returned to their house. Her husband PW 2 Vasant left for Parel. Thereafter, her sister-in-law came to her house. They were sitting outside. Suddenly her sister-in-law Anusaya told her that somebody was peeping at them from the corner of the school. She asked him to come there. A-2 came to them. Meantime her husband came there. A-2 showed something which was stuck to his waist. It was made of iron. She could not see clearly. A-2 said "Aaj Aamhi Father Che Raste Lavnar, Konala Sangu Naka". (Today we shall finish Father, do no tell anybody). In the meantime A-1 also came down from upstairs. A-1 told A-2 that he was waiting for him. Thereafter A-1 went upstairs from the front staircase and A-2 went upstairs from rear staircase. Thereafter they went to sleep. On the next day at about 10 a.m. her husband PW 2 informed her that Father Austine was murdered. In her cross-examination she has stated that her husband was sick and, therefore, he was given break. He was not removed from service but he was not allowed to join service again. She has further

stated that the Father had removed Suresh, Danial, Brown Danial, Haridas and some other persons from the service and they had gone to the labour court.

11. We find it difficult to believe this witness because her statement is also recorded two to three days after the incident. It is also not understood as to how this witness and her husband kept quiet when they heard the accused saying that they are going to kill Father Austine. For two to three days they did not even approach the police. It is difficult to believe such witnesses. Therefore, so far as the alleged extra judicial confessions allegedly made by A-2 are concerned there is absolutely no corroboration to it from other evidence on record.

12. Assuming for a moment that the witnesses are right when they say that after declaring that they would kill the Father, both the accused went up at about 8-15 p.m. according to PW 11 Dattaram Babaji Kadam, the watchman, the light in the Father's room was glowing till 1-30 a.m. at night and at 1-30 a.m. it was switched off. The watchman has not said that he heard any cries.

13. The postmortem notes show that there were 34 injuries on the deceased. PW 15 Dr. Shinde, who

did postmortem on the deceased has stated that there were four serious internal injuries corresponding to external injuries Nos. 1 to 14. The internal injuries were as follows:

(i) Injuries under the scalp, their nature:- Contusion of scalp underneath ext. injury No.1,2,3,4,5,6,7,8 to 14 (i.e. 1 to 14) with haematoma underneath respectively. Haemorrhage into both temporalis muscle.

ii) Skull-Vault and base-describe fractures, their sites, dimensions, directions etc.:- In tact skull vault. Linear fracture Lt. ant. crenial fossa.

iii) Brain - The appearance of its coverings, size, weight and general condition of the organ itself and any abnormality found in its examination to be carefully noted (Weight M. 3 grams F. 2.75 grams):-

50 ml. extradural haematoma on Ltd. parieto temporal area.

50 ml. subdural haematoma on the Rt. parieto temporal area.

Subarachnoid haemorrhage over entire brain.

Contusion of Lt. parietal lobe of brain 4.0 cm. X 3.2 cm. and left temporal lobe of brain base 1.1 cm. x k1.0 cm.

Brain congested Wt. 1310 gms."

14. According to Dr. Shinde the cause of death was due to head injury with fracture nasal bones, fracture mandible, fracture maxilla by hard and blunt object. (unnatural). He has further stated that all the injuries except injury No. 20, 21, 27 and 28 can be caused by spanner Art. M-2. Now if the deceased was assaulted with such severity that he should receive 34 external injuries then he would certainly have raised cries. But the watchman does not say that he heard any cries. If the accused went up at about 8-15 p.m. then it is not known as to how the light was on till 1-30 a.m. and who switched it off at 1-30 a.m. It is not clear at what time the incident took place. According to PW 11 Dattaram Kadam, as the other watchman did not come to attend the duty in the morning at 7 a.m. he continued to do his duty. That means he was throughout on duty, then it is surprising that he did not hear any cries and did not see any one leaving the school premises after committing murder. We, therefore, feel that

genesis of the prosecution case has been suppressed.

15. PW 12 is Morgan Harman D'mellow. He is Ex-student of Joseph Cardinal Technical School. According to him from 1973 to 1974 he worked in production department of the said school and thereafter he was appointed as an Instructor in the same school from 1975 to 1995. He has stated that A-2 used to cook for the Father in September, 1995. A-2 was sacked from service and A-1 was appointed as cook thereafter. In the cross-examination he has said that some people used to talk good about Father Austine and some people used to talk bad about him.

16. PW 4 David Samuel is the complainant. He was the Vice Principal of Joseph Cardinal Technical School. He has stated that at about 7-30 a.m. on 6th of January, 1997 they had assembelled in the hall for prayer. As the Principal was absent he was looking after his work. Around 8-30 a.m. Mr. Sallis came there and informed him that he wanted to see Father Austine but Father was not in his office. He informed him that nobody was responding to the intercom of Father Austine. He stated that Father Austine even did not come to take his breakfast. They found that the room was closed.

Hence he brought the duplicate keys and handed them over to Mr. Sallis. They went upstairs and found the Father dead and lying in a pool of blood. He then went to Bhoiwada police station. Police Officer Mr. Mudgal accompanied him to the school. Police officer summoned Dr. Jain. Dr. Jain examined Father and declared him dead. His complaint came to be recorded which was treated as F.I.R. and which is at Exhibit P-14. He has stated that A-1 was working as cook with Father Austine. A-2 was working earlier to A-1. In the cross-examination he has stated that Father Austine had many enemies.

17. PW 6 is Mahesh Sudam Deshmukh. He is the pancha to Memorandum of Panchnama Exhibit P-19 and P-19A. According to him on 15/1/97 at about 4-15 p.m. he was called at Bhoiwada police Station to act as pancha. A-2 made a statement which was recorded by the police. The Memorandum was prepared. He signed on the said memorandum. A-2 stated that he had kept chain, torch, scent bottles and cash in his room at Antop Hill, Sion. Pursuant to the said statement A-2 led the police to the said place opposite one school situated at Antop Hill, Sion. A-2 opened his room with the key. He opened one suit case and took out one chain, one torch, 2 bottles of scent, one spanner which was

blood stained, one black pant and shirt having blood stains and currency of Rs.100/- and Rs.50/-and handed them over to the police. In his cross-examination also he is consistent. He has, however, added that there was no mark of injury on the person of A-2.

18. PW 7 Eleano Noel Rodricks is the sister of Father Austine. On 10/2/97 she was called to Bhoiwada Police Station. She was shown one gold chain, wrist watch, pocket radio and bunch of keys. According to her she had identified them to be the articles belonging to her brother Father Austine. In her cross-examination she has admitted that her brother was a very disciplined person and he was very short tempered.

19. PW 8 is Bruno Cecil Cerejo. He is the brother of deceased Father Austine. He has also identified chain, wrist watch, transistor and bunch of keys when they were shown to him as belonging to his brother.

20. PW 13 Harun Dastagir Jamdar, PSI was at the relevant time attached to Bhoiwada Police Station. He has given the details of investigation conducted by him. He has stated that he took blood samples from the spot under the spot panchnama. He took

charge of the clothes from the person of the dead body of the Father. The clothes are Art. M-10, Art. M-11, Art. M-12, Art. M-13. He called the fingerprint expert. One towel and shirt was lying in the bathroom. They were bloodstained. He noticed four hairs, one struck in the nail of index finger of deadbody, one struck on the finger and two on the sweter. He took charge of the articles under the panchnama. According to him he visited scene of offence and collected blood sample of the blood spot on a wall near light switch, on a wet cotton swab. On 9/1/97 A-1 was apprehended and his clothes were taken charge of under the panchnama.

21. PW 14 is Jalander Balu Kurne, PI attached to Bhoiwada Police Station. He has also given the details of investigation conducted by him. He has stated that on 13/1/97 the police sent all the articles which were seized from the scene of offence to Chemical Analyser along with a forwarding letter. On 7/2/97 the police forwarded articles which were recovered under panchnama P-19 and P-19A to the chemical analyser. He has, however, stated that the forwarding letter is not available on record.

22. The chemical analyser’s report shows that on the clothes of the deceased seized from his body

the blood of 'A' group was found. The chemical analyser's report also states that the blood group of the deceased was 'A' and blood group of A-2 is 'O'. The spanner allegedly recovered at the instance of A-2 was stained with blood but the chemical analyser's report states that though it was human blood its group could not be identified. Similarly two full pants and a pair of shoes were allegedly recovered at the instance of A-2. Human blood was found on them but the blood group could not be determined. There is no evidence to suggest that the clothes and/or shoes were of the accused and he had worn themon on the day of incident. Nor there is any evidence to establish that the said clothes and the shoes were that of the deceased. The brother and sister of the deceased have not identified them as the clothes of the deceased. Morever since the blood group of the blood found on these articles could not be determined this circumstance does not help the prosecution.

23. So far as the spanner allegedly discovered at the instance of A-2 is concerned, it was not shown to any of the witnesses. Nobody has identified it as the weapon carried by A-2 to the Father's room. The chemical analyser's report does not say that the blood found on the spanner was of the blood group of the deceased Father. So far as finding of

articles belonging to the deceased in the house of accused 2 is concerned, that by itself will not connect him to the murder. We have found that none of the prosecution witnesses examined to establish that A-2 had made extra judicial confessions can be believed. If there is no credible evidence to establish that A-2 murdered the Father, finding of the Father's articles in A-2's house may at the most suggest that he is a receiver of stolen property. We have already noted that all witnesses including Mr. Swamy, the Vice Principal have stated that the Father had many enemies. Therefore, the possibility of someone else committing the murder of the Father cannot be ruled out. Morever according to the prosecution A-1 was with A-2 when the murder was committed but A-1 has been given benefit of doubt and acquitted. In such circumstances and with the kind of evidence adduced by the prosecution it would be unsafe to hold that A-2 killed the Father.

24. According to us evidence of PW 16 Dr. Nutan also does not inspire confidence. Till the statement of the accused under Section 313 of the Code was recorded Dr. Nutan was not examined. No acceptable explanation is given as to why she was not examined earlier. Belatedly the prosecution made an application and examined her. The incident

had taken place on 5/1/97. A-2 came to be arrested on 14/1/97. Dr. Nutan has stated that A-2 was examined at 9 p.m. on 14/1/97 and he gave alleged history of accidental injury to scrotum region while murdering the Father. In the cross-examination she has stated that since it was a case of swelling without blood the age of injury could not be ascertained. She could not say whether the injuries were fresh. We have seen the relevant entry in the Municipal Corporation register. We find that Dr. Nutan had made one entry pertaining to the examination of A-2. She had signed it. But that entry is cancelled. However, just below that there is another entry but surprisingly that entry is not signed by her. It is surprising how the relevant entry in xerox copy of casualty register Exh. P-48A is not signed by Dr. Nutan. In the circumstances we find it difficult to place any reliance on the said entry. Morever this entire story appears to us to be unnatural. The doctor has said that she could not give the age of the injury. It is, therefore, difficult to link this injury to the incident in question.

25. It is also pertinent to note that PW 6 Mahesh Deshmukh who is a pancha to panchnama Exh. 19-A under which articles allegedly recovered at the

instance of A-2 were seized, has stated in the cross-examination that there was no mark of injury on the person of A-2 on 15/1/97. It is true that injury at scrotum region could not have been noticed by a person who had just glanced at him but if as suggested by the prosecution, the deceased had offered any resistance and A-2 had received injuries because of it, some other injuries would have been visible. The fact that PW 6 Deshmukh has made a categorical statement that there was no mark of injury on person of A-2 makes a dent in the prosecution story.

26. In our opinion in the circumstances of the case and considering the fact that Dr. Nutan was examined after statement of A-2 under section 313 of the Code was recorded, her evidence does not inspire confidence. After Dr. Nutan was examined as a witness, again A-2 was examined under Section 313 of the Code. He stated that he was not examined by PW 16 Dr. Nutan. According to him on 14/1/97 between 4 a.m. to 5 p.m. he was badly assaulted by police. Police kicked him on his private part. He sat down. He had severe pain and police took him to the hospital at about 9 a.m. The doctor did not examine him. Police asked the doctor to note in the record that he had received the said injury while killing the deceased. In our

opinion, in the facts and circumstances of the case the explanation given by A-2 appears to be probable.

27. Having considered the evidence adduced by the prosecution and the defence of A-2, we are of the opinion that the prosecution has not established its case against A-2 beyond reasonable doubt. Suspicion cannot take place of proof. We are, therefore, of the opinion that A-2 must be given benefit of doubt, and acquitted. Hence we pass the following order:

(a) The judgment andorder dated 28/2/2000 passed by the Addl. Sessions Judge, Greater Bombay in Sessions Case No. 544 of 1997 convicting A-2 Nicholas @ Neckless @ Subhash Sunil Piada under Section 302 of the I.P.C. and sentencing him to suffer R.I. for life and also to pay a fine of Rs.1000/- in default to suffer R.I. for one month is quashed and set aside. He is acquitted of the said charge.

(b) A-2 Nicholas @ Neckless @ Subhash Sunil Piada is ordered to be released from custody unless he is required in some other case.

(c) Appeal is disposed of.

(SMT. RANJANA DESAI,J.)

(D.B. BHOSALE,J.)